

3. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, and/or 28 U.S.C. § 1391(e), as the Defendant agency resides in this district.

III. PARTIES

4. Plaintiff THE ARK INITIATIVE, is a nonprofit charitable public-interest organization dedicated to saving Earth's species. The Ark Initiative uses three primary approaches to achieve its mission: (1) work to educate the public and government officials about the importance of protecting wild places and biological diversity, (2) use civil and lawful advocacy methods to encourage actions that better protect native species and their habitats, and (3) serve as a think-tank to develop novel strategies for conserving wildlife.

5. In particular, The Ark Initiative has worked to protect the Burnt Mountain environment adjacent to the Snowmass Ski Area. As part of that effort, it requested public documents from the Defendant Forest Service to understand potential impacts posed by activities that the Forest Service has authorized on Burnt Mountain and the Snowmass Ski Area. This document request is the subject of this lawsuit.

6. Defendant UNITED STATES FOREST SERVICE is a federal agency under the U.S. Department of Agriculture. The Forest Service is responsible for responding to document requests submitted to it, and so is sued as a Defendant in this action.

7. The Defendant's violations of law have denied Plaintiff the information to which it is entitled free of charge, and Plaintiff and its members are injured by its inability to protect Burnt Mountain, by the deprivation of government documents to which they are entitled, and pecuniarily by the requirement to pay for such documents.

IV. FACTS AND LAW

8. On March 2, 2012, and pursuant to 40 C.F.R. § 1506.6(f), Plaintiff emailed a request for documents (dated February 29, 2012) to the Forest Service regarding decisions that the agency has made which affect Burnt Mountain. Plaintiff requested that the agency provide the documents in electronic format to avoid any copy costs, and to waive any search fees. The agency received the request on March 2, 2012, but claims that it was not lodged with the proper component of the agency until March 12, 2012.

9. Among the records requested were (1) various monitoring records required to be compiled by a 1995 environmental impact statement (EIS) issued on the Snowmass Ski Area; and (2) documentation on roadless area inventories conducted on the lands of Burnt Mountain and incorporated into a 2002 environmental impact statement that Defendant prepared for the revised Forest Plan for the White River National Forest.

10. Regarding documents in the first group of records (1), The Ark Initiative believes the Defendant has not completed impact monitoring required by the EIS or, in some cases, has completed the monitoring but then failed to take remedial action specified in the EIS to eliminate or minimize the environmental impacts. Plaintiff requested these records to evaluate compliance with the EIS.

11. Regarding documents in the second group of records (2), The Ark Initiative believes most of Burnt Mountain is in an undeveloped and roadless condition eligible for designation as part of the national Wilderness system. The Defendant has authorized the construction of new ski runs in this area without recognizing the area is roadless and eligible for Wilderness designation. Plaintiff therefore has requested records from the Defendant to determine whether the agency had inadvertently or intentionally overlooked this issue before authorizing the new

ski runs. If the area is, in fact, roadless and eligible for Wilderness designation, then it would mean the Defendant has violated other laws in authorizing construction of new ski runs on Burnt Mountain without the impact disclosure required by NEPA.

12. The Forest Service responded to Plaintiff's request on March 26, 2012, and without addressing the request to waive fees, asked if Plaintiff would be willing to pay an unspecified amount for fulfilling the request. Plaintiff replied on March 27, 2012, in part reiterating its fee waiver request. Plaintiff also asked the Defendant to provide a statement of reasons, in accordance with 5 U.S.C. § 555(e), for why the agency was not waiving fees as specified in 40 C.F.R. § 1506.6(f) and because records were requested in electronic format.

13. The Forest Service responded on April 6, 2012, stating: "In your February 29, 2012 letter, you request a fee waiver citing 40 C.F.R. 1506.6(f). We are not finding the connection between this cite and your qualifying for a fee waiver under 5 U.S.C. 552. Your letter indicates you will provide further information to demonstrate your entitlement to a waiver under 40 CFR 1506.6(f)."

14. Together with its April 6, 2012 letter, Defendant provided Plaintiff with 100 pages of records at no charge "under 5 U.S.C. 552."

15. Plaintiff replied on April 10, 2012, stating in part: "Unfortunately, your letter suggests we will not receive any other records unless we pay unspecified fees or provide information to show that we are entitled to a waiver under 40 C.F.R. § 1506.6(f). That regulation does not require requesters to make any showing that they are entitled to a fee waiver." Plaintiff also explained that 40 C.F.R. § 1506.6(f) does not limit its fee waiver to 100 pages.

16. On April 12, 2012, Defendant sent Plaintiff an email stating that "We did not have a cost estimate at the time of our last email correspondence to you but we arrived at an estimate at

this time, which is our estimated cost of search time is \$1,168.09 plus our estimated duplication costs of \$60.” The email did not explain how the fee estimate was calculated and did not explain to the Plaintiff why the agency was not waiving the search fees in accordance with 40 C.F.R. § 1506.6(f). Instead, the reply stated the Plaintiff’s request was forwarded to the regional FOIA coordinator and the fee waiver request would be answered at that level. As of the time this complaint was filed, the regional FOIA coordinator has not responded to Plaintiff’s record request of fee waiver request.

17. On April 13, 2012, Defendant sent Plaintiff another email, again without addressing Plaintiff’s repeated requests for a fee waiver or statement of reasons, but offering “documents that may help.” One of the documents was the index for an Administrative Record in another case and was not part of Plaintiff’s record request. The other document was a group of records apparently dating from the early and mid-1980s concerning administrative appeals of a proposal to create new ski runs on Burnt Mountain. The latter relates to one of the 35 items requested by Plaintiffs. However, the vast majority of records requested have not been furnished by the Defendant.

18. Regulations promulgated by the Council on Environmental Quality to implement NEPA state:

Agencies shall [m]ake environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

40 C.F.R. § 1506.6(f). This regulation contains no special factors that a requester must show to

qualify for a fee waiver.

19. The APA provides that “prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.” 5 U.S.C. § 555(e). To date, the Forest Service has not provided an explanation for why it believes that it may charge fees for the requested records, despite 40 C.F.R. § 1506.6(f).

20. FOIA states: “An agency shall not assess search fees . . . if the agency fails to comply with any time limit” of FOIA. 5 U.S.C. § 552(a)(4)(A)(viii). An agency is required to make a determination on a records request, including a fee waiver request, within 20 working days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i).

21. In computing the time limit for responding to a request under FOIA:

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

5 U.S.C. § 552(a)(6)(A).

22. Accordingly, even if an agency may make more than one request to clarify fee assessments, and even if March 12, 2012 is the date that Plaintiff's document request should be considered to have been “received” by the agency, the Forest Service's determination on

Plaintiff's document request, including its fee waiver request, was due April 16, 2012 (20 working days after March 12, plus 1 tolling day between March 26 and March 27, plus 4 tolling days between April 6 and April 10 was Saturday April 14; April 16 was next business day).

23. The Forest Service, as of the date of the filing of this complaint, has not made a determination on Plaintiff's document request, including its fee waiver request.

V. CLAIMS FOR RELIEF

Claim One: Violation of NEPA, the APA & FOIA

24. The above paragraphs are incorporated here by reference.

25. 40 C.F.R. § 1506.6(f) provides that an agency must provide, pursuant to FOIA, NEPA documents to those who request them free of charge unless not practicable, and then may only charge an amount equal to the "actual costs of reproducing copies required to be sent to other Federal agencies." 5 U.S.C. § 555(e) requires an explanation for the denial of relief requested by a member of the public. To date, the Defendant Forest Service has neither granted a fee waiver to Plaintiff under section 1506.6(f) nor provided a valid explanation for why it believes it need not do so, and so has violated NEPA through violating 40 C.F.R. § 1506.6(f), and the APA through violation of 5 U.S.C. § 555(e). For this reason, the defendant has unlawfully withheld required agency action, and/or acted in a manner that is arbitrary, capricious, and otherwise not in accordance with law, *see* 5 U.S.C. §§ 701-706, and FOIA, 5 U.S.C. § 552.

Claim Two: Violation of FOIA

26. The above paragraphs are incorporated here by reference.

27. The Defendant Forest Service has violated FOIA by exceeding the deadlines for

making a determination on Plaintiff's records request, and then by charging search fees for this request, in violation of 5 U.S.C. §§ 552(a)(4)(A)(viii), 552(a)(6)(A).

VI. REQUEST FOR RELIEF

FOR THESE REASONS, the Plaintiff respectfully requests that this Court enter judgment providing the following relief:

1. Declare that Defendant violated NEPA, the APA, and FOIA by failing to make a timely determination on Plaintiff's records request, and by improperly charging fees for agency records requested;
2. Direct by injunction that Defendant immediately provide The Ark Initiative with the records it has requested free of charge;
3. Grant the Plaintiff its costs of litigation, including reasonable attorney fees as provided by FOIA, 5 U.S.C. § 552(a)(4)(E) and/or the Equal Access to Justice Act, 28 U.S.C. § 2412; and
4. Provide such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED April 17, 2012.

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